IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 20, 2008

KEITH JACKSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2001-D-2175 Seth Norman, Judge

No. M2008-00145-CCA-R3-PC - Filed February 4, 2009

The Petitioner, Keith Jackson, appeals from the Davidson County Criminal Court's order denying his petition for post-conviction relief. The Petitioner is currently serving a thirty-six-year sentence as a result of a jury conviction for possession with the intent to sell twenty-six grams or more of a substance containing cocaine in a Drug-Free School Zone. On appeal, the Petitioner argues that the post-conviction court erred in foreclosing proof on his suppression issues, finding that the issues were previously determined, and that a new constitutional right established in Georgia v. Randolph, 547 U.S. 103 (2006), was not recognized as existing at the time of his trial and requires retroactive application to his conviction. After a review of the record, the denial of post-conviction relief is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Jordan Mathies, Nashville, Tennessee, for the appellant, Keith Jackson.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and John Zimmerman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On September 28, 2001, officers executed a search warrant for an apartment in a Nashville apartment complex. See State v. Keith Latrell Jackson, No. M2004-00562-CCA-R3-CD, 2005 WL 839299, at *1 (Tenn. Crim. App., Nashville, Apr. 12, 2005), perm. to appeal denied, (Tenn. Oct. 17, 2005). Four men, including the Petitioner, appeared to be gambling on the stoop of an apartment

located in front of the apartment that the officers were searching. See id. The Petitioner fled but, after running approximately fifty yards, returned to the apartment. See id.

> [J.D. Jones, a lieutenant with the Metropolitan Police Department] noticed a Monte Carlo, that had a temporary tag, parked near his police car, and he asked if anyone had the keys to that car. He testified that none of the men said that they knew anything about the vehicle. Lieutenant Jones later discovered that the temporary tag was issued to the [Petitioner's] mother. The lieutenant attempted to unlock the Monte Carlo using keys found on the [Petitioner], and, after he determined that the keys successfully unlocked the car, he re-locked the car and called for a K-9 unit to search the car for the presence of narcotics.
>
> Lieutenant Jones testified that he was present for the K-9 search of the Monte Carlo. He said that the police dog alerted for the presence of narcotics by scratching on the passenger side door. Lieutenant Jones testified that he and the other officers opened the vehicle and found approximately $38,000 in the right passenger seat. He said that the dog also alerted the officers to the console inside the vehicle, and the officers found a bag that contained between fifty and sixty grams of cocaine. Lieutenant Jones testified that he also discovered a gun between the console and the driver's seat, and electronic scales that had cocaine residue were recovered from the console. He testified that, under the seats of the vehicle, he found dryer sheets, which are typically used to mask the scent of drugs. The lieutenant said that the [Petitioner] did not tell him where the [Petitioner] had acquired $38,000, and the [Petitioner] said that he was unemployed.
>
> Lieutenant Jones testified that he also recovered several papers and a Sprint cell phone box with a bill from the car. He said that the Sprint cell phone bill was for an account held in the [Petitioner's] name. The lieutenant found three cell phones either on the [Petitioner's] person or in the car. Lieutenant Jones stated that, based on his experience, people involved in drug trafficking use multiple cell phones to avoid detection. Lieutenant Jones testified that there was a receipt in the car for its purchase. He said that the receipt was from an auto sales store, and it described the vehicle as a black Chevrolet Monte Carlo that was purchased for $5900 in cash and paid for by the [Petitioner]. The receipt was signed by Donna Jackson, the [Petitioner's] mother.
>
> . . . .
>
> Samuel Johnson, an officer with the Metro Police Drug Task Force, testified that . . . , when he arrived at the apartment building, he saw four men on the front porch of another, nearby apartment. He testified that he wore a police uniform, and it was his responsibility to enter and secure apartment C for the other officers. Officer Johnson testified that, while he went to apartment C, Lieutenant Jones

> approached the four men on the nearby porch. Later, he assisted Lieutenant Jones by searching the [Petitioner], to ensure officer safety, and he noticed a bulge in the [Petitioner's] pocket of his pants. Officer Johnson testified that the [Petitioner] told him that the bulge was money, and the [Petitioner] gave the officer permission to remove the money. The officer explained that he removed two bunches of money totaling $5921, $2000 of which was wrapped in a white grocery bag secured by rubber bands. He testified that the [Petitioner] also had keys and a driver's license in his pocket, and he removed all of these items and placed them on the sidewalk. Officer Johnson testified that he was present when Lieutenant Jones inquired about the Monte Carlo, and no one responded.
>
> Officer Johnson testified that the K-9 officer and dog arrived to examine two vehicles, one in front of the apartment and the black Monte Carlo located on the street. He said that the dog gave a positive alert to the presence of the odor of narcotics. He said that the dog scratched the door of the Monte Carlo, and Lieutenant Jones opened the door with the [Petitioner's] keys. The dog again alerted positively to the presence of narcotics in the console area, where they found a bag containing approximately 59 grams of cocaine. The officer also found in the car drug scales, a .9 millimeter handgun, a bag containing about $36,000, dryer sheets, some baggies, and paperwork on the vehicle. He testified that the money seized totaled $43,886.

See id. at *2-3.

As a result, a Davidson County grand jury indicted the Petitioner for possession with the intent to sell twenty-six grams or more of a substance containing cocaine in a Drug-Free School Zone and possession of a firearm with the intent to employ it in the commission of or escape from an offense. See Tenn. Code Ann. §§ 39-17-417(i)(5), -432(b), -1307(c)(1). A jury found the Petitioner guilty as charged. The trial court sentenced the Petitioner to thirty-six years, at 100%, for the possession with the intent to sell twenty-six grams or more of a substance containing cocaine in a Drug-Free School Zone and three years, at 35%, for the possession of a firearm with the intent to employ it in the commission of or escape from an offense, and ordered that the sentences run concurrently.

On direct appeal of these convictions to this Court, the Petitioner contended that: (1) the trial court erred by denying his motion to suppress; (2) the evidence was insufficient to support his convictions; (3) the trial court erred in admitting the testimony of a surveyor pertaining to the use of GPS in determining the distance between the location of the offense and the real property that comprises Wharton School; and (4) the trial court erred when it sentenced him. Jackson, 2005 WL 839299, at *4. After reviewing the record and applicable authorities, this Court affirmed his conviction and sentence for cocaine possession but reversed his conviction and sentence for firearm possession. Id. at *1, 15. Our supreme court denied permission to appeal on October 17, 2005.

On October 26, 2005, the Petitioner filed a pro se petition for post-conviction relief alleging that he did not receive the effective assistance of counsel at trial.[1] Ultimately, counsel was appointed, and an amended petition was filed. As specific grounds for relief, the Petitioner averred that trial counsel was constitutionally ineffective for failing to: (1) challenge the validity, truth, and sufficiency of the affidavit of complaint in support of the search warrant; (2) call certain defense witnesses at trial; (3) conduct reasonable investigation of the Petitioner's case; (4) prepare the Petitioner for testifying at the suppression hearing; (5) withdraw as counsel after a disagreement between the Petitioner and counsel, raising a conflict of interest; (6) object to a State's witness called at trial, not listed on the indictment or provided for on any prior witness list; (7) object to hearsay testimony from Lt. Jones about statements made by other officers at the crime scene; (8) inform the Petitioner that he could hire a private investigator; and (9) challenge inconsistent statements made by the State's witnesses. He further contended that he was denied due process of law due to counsel's failure to object to evidence admitted at trial: Lt. Jones' hearsay testimony about statements made by other officers at the scene; Lt. Jones' unsubstantiated testimony that the men appeared to be gambling when officers arrived on the scene; and inadmissible testimony from a witness regarding procedures for "chain of custody evidence examinations and storage of seized narcotics." Finally, the Petitioner argued that he was denied a fair trial because (1) a mistake was made in the jury charge; (2) the prosecutor made improper comments during closing argument; (3) the State failed to fingerprint evidence seized from the Petitioner at the scene; and (4) seizure of the Petitioner's keys at the scene amounted to an unreasonable search and seizure.

A hearing was held in the post-conviction court at which the Petitioner and his two trial attorneys were the only witnesses.[2] After hearing the evidence presented, the post-conviction court denied relief by written order filed September 10, 2007. The post-conviction court concluded that the Petitioner failed to prove his allegations by clear and convincing evidence, ruling as follows:

> The [P]etitioner now contends that he was denied effective assistance of counsel with regard to representation afforded in his defense. First, the [P]etitioner specifically claims that counsel was ineffective for failing to challenge the validity, truth and sufficiency of the affidavit of complaint and the wiretap order. However, these matters were addressed by suppression motion prior to trial as well as on appeal and found to be without merit. The claim cannot survive post-conviction[.]
>
> The [P]etitioner's second issue rests on the assertion that counsel's representation was inadequate in the failure to thoroughly investigate the facts and subpoena certain witnesses at trial. However, the [P]etitioner failed to call any of these witnesses at the evidentiary hearing in this matter, thus precluding the [c]ourt's

[1] Because no mandate had been issued from the appellate court when the Petitioner first filed his petition for post-conviction relief, he refiled the same petition on February 28, 2006.

[2] Originally, Mr. Dale Quillen served as the Petitioner's trial counsel. Following a disagreement between the two, Mr. Kenneth Quillen, Dale Quillen's son, took over representing the Petitioner. Mr. Kenneth Quillen performed most of the trial functions, including those involved in this appeal.

consideration of their testimony which would have been purportedly beneficial to the [P]etitioner. Furthermore, Mr. Kenneth Quillen stated that he had thoroughly examined the [S]tate's evidence against the [P]etitioner, including the witnesses they presented. He stated that he conferred at length with Mr. Dale Quillen regarding all of the witnesses and that the [P]etitioner did not seem to have any problems with or complaints by the [P]etitioner.

Another assertion by the [P]etitioner regarding counsel's alleged failure to prepare a defense is based on the fact that no private investigator was employed to assist in the case. It is uncertain as to how an investigator would have provided any assistance in this case considering the circumstances. The [P]etitioner was undoubtedly the individual arrested at the scene and that he was in possession of large amounts of cash and cocaine. The only other factor that the [S]tate had to prove was that the possession occurred within 1,000 feet of a school zone. Mr. Kenneth Quillen testified that he researched the lot lines and property data in the Office of the Property Assessor in an attempt to establish a defense to the charges, but was unsuccessful.

The amount of evidence against the [P]etitioner was great, thus presenting an almost insurmountable task in achieving a favorable verdict. The facts of the case do not indicate that obtaining the services of an investigator would have assisted the [P]etitioner in forming a stronger defense. As a result, this issue is also without merit.

By testimony adduced at the hearing in this matter, it was revealed that the [P]etitioner was offered a sentence of 13 years if he wished to enter a guilty plea. The [P]etitioner, by his own admission, refused the offer because it was not good enough. He testified that he thought it would be worth the risk to try the case rather than accept a plea agreement with such a lengthy sentence. Both of the [P]etitioner's attorneys advised him that it would be in his best interest to accept the plea offers, but he did not wish to accept them. Now that the [P]etitioner is serving a 36-year sentence at 100%, he complains of ineffective assistance of counsel. The fact is that Kenneth Quillen provided the [P]etitioner with such exceptional legal representation by successfully appealing the firearm conviction and ultimately garnering a dismissal of the charge.

This appeal followed.[3]

[3] The Petitioner filed an untimely notice of appeal. However, this Court, by order dated April 30, 2008, has already determined to waive the timely filing of this document in the interest of justice.

ANALYSIS

On appeal, the Petitioner presents two arguments for our review. First, he contends that post-conviction court erred in finding that his suppression issues were previously determined, prohibiting any further proof on the matter. Second, the Petitioner argues that the Supreme Court decision in Georgia v. Randolph, 547 U.S. 103, 120 (2006) (holding that police officers could not lawfully enter and search a shared residence based on the consent of one occupant when a second occupant was also present and contemporaneously objecting to the search), is retroactively applicable to his case, and the rule announced therein affords him post-conviction relief.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

I. Suppression of the Evidence

First, the Petitioner contends that the trial court erred in finding that his illegal search and seizure argument had been previously determined and, accordingly, in denying him the opportunity to present evidence supporting that argument. In his brief, he contends that, at the post-conviction hearing, he raised "new arguments for improper suppression of the evidence, based upon lack of consent and lack of probable cause of the arresting [officer] to search the vehicle . . . ."

Despite his contention, the Petitioner seeks to reexamine the same grounds presented at the suppression hearing—lack of consent to search the Petitioner's person and lack of probable cause to search the Petitioner's automobile. We cite to the thorough analysis of this Court's review of the Petitioner's suppression issues on direct appeal:

> Pretrial, the [Petitioner] filed a motion to suppress the weapon found in the [Petitioner's] vehicle. As grounds, the [Petitioner] alleged: (1) the law enforcement officers lacked any authority to search the [Petitioner]; and (2) the law enforcement officers entered the vehicle without authority and without a warrant. Specifically, the [Petitioner] argues that the search conducted of him and the subsequent search of the vehicle was warrantless, nonconsensual, and did not fall within any of the recognized exceptions to the Fourth Amendment protection against unreasonable searches and seizures and, as such, that all evidence derived from that search is inadmissible. The trial court conducted an evidentiary hearing and denied the motion. The trial court held:

> My recollection . . . is that once an individual denies any interest in the automobile, they have the right to search and to use anything, even though he might come along later and prove that it was his automobile or that he had interest in the automobile.
>
> . . . .
>
> And the proof right now before me is that everybody out there denied anything to do with the automobile. That's the proof before me.
>
> . . . .
>
> [T]wo officers have testified that everybody said they didn't have anything to do with that vehicle, whose automobile is that? I don't know, is what they said. Then later on this gentleman says, after the search, this gentleman says it's my mother's automobile. That's where we are as far as the automobile is concerned.
>
> . . . .

1. Stop of the [Petitioner]

. . . .

We must first determine whether the detention of the [Petitioner] by the police officer amounted to a seizure. If so, we must then determine whether the officer possessed an articulable reasonable suspicion for an investigatory stop under Terry and its progeny. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry [v. Ohio], 392 U.S. [1,] 19 n.16; State v. Hord, 106 S.W.3d 68, 70 (Tenn. Crim. App. 2003). The Supreme Court stated that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554; Hord, 106 S.W.3d at 71. In the case under submission, it is clear that the [Petitioner] was "seized" within the meaning of the State and Federal Constitutions. Officer Jones testified that he ordered the [Petitioner] to return to the apartment, made the [Petitioner] lay on the ground, and handcuffed the [Petitioner]. Therefore, it is clear that the [Petitioner] was "seized" within the meaning of the Terry decision. Thus, for the seizure and subsequent search of the [Petitioner] to be constitutionally permissible, the officer must have had reasonable suspicion, supported by articulable facts, that the [Petitioner] had committed, or was about to commit a criminal offense.

. . . .

In our view, under this totality of the circumstances test, Lieutenant Jones's warrantless seizure and search of the [Petitioner] was permissible as a "stop and frisk" exception to the warrant requirement. When Lieutenant Jones arrived at the apartment building where a search warrant was to be executed, he observed the [Petitioner] and three other men on the stoop of another apartment in the building, gambling with dice. It was the lieutenant's responsibility to control these four men while the other officers searched apartment C. Controlling these men was necessary to ensure the other officers' safety. As Lieutenant Jones approached these men to control them, the [Petitioner] began to put something in his pockets and walk away from the lieutenant. The [Petitioner] then began to run down the street, and the lieutenant drew his gun and ordered the [Petitioner] to get on the ground. The [Petitioner] went about fifty yards, then stopped, and returned to the apartment. The [Petitioner's] behavior established a reasonable suspicion that the [Petitioner] was engaged in unlawful conduct, therefore, Lieutenant Jones was justified in ordering the [Petitioner] to return to the apartment. Further, Officer Johnson testified that he "did a pat down" search of the [Petitioner] for officer safety, and he noticed a bulge in the [Petitioner's] pants. The officer removed the bulge which was $5921 in currency, and $2000 of that amount was wrapped in a white bag with rubber bands around it. We conclude, therefore that the search of the [Petitioner] was permissible based on the "stop-and-frisk" exception to the warrant requirement. Accordingly, we must next determine whether the subsequent search of the [Petitioner's] vehicle was also permissible.

2. Search of the Vehicle

The [Petitioner] further contends that the police officers had no authority or basis to conduct a search of his car. Our Supreme Court has previously held that "a canine sweep around the perimeter of a vehicle which has been legally detained does not constitute a search, and thus, does not require probable cause or reasonable suspicion . . . ." State v. England, 19 S.W.3d 762, 764 (Tenn. 2000); see also Timothy Rathers v. State, No. W2000-02177-CCA-R3-PC, 2002 WL 1549771, at *6 (Tenn. Crim. App., Jackson, Jan. 18, 2002). In order to find that an officer had probable cause to search a vehicle based upon a positive alert by a trained drug detection dog, the dog's reliability must be established. [England, 19 S.W.3d] at 768; see also State v. John David Smith, No. W2003-01200-CCA-R3-CD, 2004 WL 737532, at *4 (Tenn. Crim. App., Jackson, April 6, 2004), perm. app. denied (Tenn. 2004). This includes consideration of the dog's training, the officer's training and experience with the dog, and the record of false negative and false positive alerts. [England, 19 S.W.3d at 768].

At trial, Officer Johnson testified that he was present when Lieutenant Jones inquired about the vehicle parked out front, and Officer Johnson said that there was

> no answer from any of the men about the vehicle. Based on their findings from the initial search of the [Petitioner], including a key that fit the vehicle, the officers subsequently contacted the K-9 unit to perform a sweep on the vehicle. At trial, Officer Spencer testified about Rocky's training and his own training as a handler of K-9 dogs. The officer stated that Rocky was assigned to him in 2001, and he and Rocky are recertified every year as a K-9 handler team by the United States Police K-9 Association. We conclude that, since training and reliability were established, the police had probable cause to search the vehicle upon the canine's alert on the passenger's door. Id. at 768-69. This issue is without merit.

Jackson, 2005 WL 839299, at *4-7.

Claims which have been previously determined cannot establish a basis for post-conviction relief. Tenn. Code Ann. § 40-30-106(f). "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence." Tenn. Code Ann. § 40-30-106(h).

A suppression hearing was held before the trial court. After considering the evidence presented, the trial court denied the motion to suppress. A panel of this Court affirmed that decision. We agree with the post-conviction court that the issue has been previously determined, foreclosing further review.

II. Georgia v. Randolph

Second, the Petitioner submits that the Supreme Court's decision in Georgia v. Randolph, 547 U.S. 103 (2006), established a new constitutional right, requiring retroactive application and entitling him to post-conviction relief. We begin by noting that the Petitioner did not make this legal argument in his petition or at the evidentiary hearing. The Petitioner contends that the Randolph decision had not yet been rendered at the time of his post-conviction hearing; however, this statement is apparently incorrect because the hearing occurred July 7, 2007, over a year after the Randolph decision was issued. Thus, the issue is waived due to the Petitioner's failure to include it in his petition or raise it in the post-conviction court. See Tenn. Code Ann. § 40-30-104(d) ("The petitioner shall include all claims known to the petitioner for granting post-conviction relief and shall verify under oath that all such claims are included."); -106(g) ("A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented"). The issue may not be presented for the first time on appeal.

Waiver notwithstanding, the Supreme Court, in Randolph, did not make it retroactive to cases on collateral review. There is no language suggesting it should be retroactive to cases on collateral review, nor has there been any indication by the Supreme Court since Randolph (or by any other court of which we are aware) that the decision should be applied retroactively to state convictions

already final at the time of the decision. See Tyler v. Cain, 533 U.S. 656, 663 (2001) (holding that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive").

Finally, Randolph appears to be inapplicable to the facts of this case. In Randolph, the defendant's estranged wife consented to the search of the marital residence, but the defendant, who was present, expressly and unequivocally refused to give consent to search the residence. 547 U.S. at 121. Under these facts, the Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." Id. at 120. Here, the facts are distinguishable from Randolph, as noted by this Court on direct appeal, the search of the Petitioner was performed under the "stop and frisk" exception to the warrant requirement and the Petitioner's car was searched after a K-9 unit alerted to the presence of drugs, establishing probable cause. See Jackson, 2005 WL 839299, at *4-7.

CONCLUSION

Based upon the foregoing reasoning and authorities, we affirm the Davidson County Criminal Court's denial of post-conviction relief.

_____

DAVID H. WELLES, JUDGE